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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE MARTINEZ,

Defendant and Appellant.

D073434

(Super. Ct. No. SCD270200)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed in part and reversed in part, with directions.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Jorge Martinez guilty of attempted kidnapping during a carjacking (Pen. Code,<sup>1</sup> §§ 664, 209.5), attempted kidnapping (§§ 664, 207, subd. (a)), and attempted carjacking (§§ 664, 215). After Martinez admitted several prior convictions, the trial court imposed a 25-year prison term, which included a five-year enhancement for a prior serious felony conviction.

On appeal, Martinez contends the trial court erred by modifying a pattern jury instruction (CALCRIM No. 316) to state that the jury could consider a prior conviction for "a crime of moral turpitude"—as opposed to "a felony"—in evaluating the credibility of his testimony, and by giving a special instruction that defined moral turpitude as "a general 'readiness to do evil' . . . ." Although he did not object to these moral turpitude instructions at trial, Martinez now contends they improperly suggested to the jury that it could consider his prior convictions as propensity evidence and not merely for impeachment. We conclude Martinez forfeited this challenge by failing to object at trial, and that the exception to the forfeiture rule for errors implicating a defendant's substantial rights does not apply on the record here.

Martinez also contends insufficient evidence supports his conviction for attempted kidnapping during a carjacking. We disagree. Ample evidence supports his conviction under the legal standard applicable to attempt offenses.

Finally, Martinez contends he is entitled to relief under recently enacted Senate Bill No. 1393, which became effective on January 1, 2019, and amends sections 667 and

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated.

1385 to give trial courts the discretion to strike five-year prior serious felony enhancements. The Attorney General agrees Senate Bill No. 1393 applies retroactively, but argues remand is unnecessary because the trial court's comments during the sentencing hearing indicate the court would not have exercised its newly vested discretion favorably to Martinez. We agree Senate Bill No. 1393 applies retroactively. Because we are unable to say with certainty how the trial court would have exercised its newly vested discretion, we will remand for that limited purpose. In all other respects, we affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

In March 2017, the People charged Martinez with attempted kidnapping during a carjacking (§§ 664, 209.5), attempted kidnapping (§§ 664, 207, subd. (a)), and attempted carjacking (§§ 664, 215). The People alleged Martinez suffered four prison priors, a strike prior, and a prior serious felony conviction.<sup>2</sup>

#### *The Prosecution Case*

Monica N. was Christmas shopping at the Horton Plaza mall on December 19, 2016. At about 10:00 p.m., she left the mall and walked to her car on the fourth floor of

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<sup>2</sup> The four prison priors were: a 2003 robbery conviction (§ 211) with a firearm-use enhancement (former § 12022, subd. (b)(1)); a 2005 conviction for possession of a weapon by a prisoner (§ 4502, subd. (a)); a 2012 conviction for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)); and a 2014 conviction for vandalism (§ 594). The People alleged the 2003 robbery conviction also constituted a strike prior and a prior serious felony.

the adjacent parking structure. Footage from mall security cameras shows Martinez following Monica out of the mall.

Monica unlocked her car, placed her shopping bags in the back seat, and sat in the driver's seat. Before she closed her door or started the car, Monica realized Martinez was sitting directly behind her in the back seat. Monica was startled and confused. She turned around and said " 'what,' to try to kind of understand what was going on." Martinez said, " 'Get out.' " Monica responded, " 'No,' " and "started screaming, 'get out. Get out. Get out.' " Martinez did not get out; he stayed in the back seat, smoking a cigarette.

Monica stood up, straddling her doorway with one foot inside the car and the other foot outside, and repeatedly honked the horn and screamed for help. Martinez got out of the car and stood in front of Monica, confining her between the open car doors. This made Monica "more scared because [she was] blocked in." Martinez grabbed both of Monica's arms and told her to calm down. Monica "felt how strong [Martinez] was," which "made [her] fear even more for [her] life."

Monica punched at Martinez and tried to get back in her car. Martinez pushed her toward the car and grabbed the steering wheel, attempting to also enter the car. Monica thought he was trying to either take her or her car. She pushed and kicked Martinez out of the car, but he got in the back seat and said, "I want a ride" or "I just need a ride." Monica did not want to give Martinez a ride, but told him she would—she actually intended to eject Martinez from the open rear door by driving erratically.

Monica implemented her plan by "whipping the car . . . around" and lurching forward and backward. At some point, she saw that Martinez was no longer in the back seat. She drove to the exit booth and called 911.<sup>3</sup>

Police responded to the scene but were unable to find Martinez. Using the mall's security camera footage, a detective circulated "wanted" fliers, which generated several leads. Based on those leads, the detective showed Monica a photo lineup of possible suspects. She immediately identified Martinez as her attacker, with no hesitation "whatsoever." Monica also identified Martinez at trial.

Monica testified Martinez did not appear to be "under the influence of anything" during the incident. To the contrary, she thought "[h]e seemed very clear, focused, [and] determined . . . ."

Monica acknowledged on cross-examination that Martinez did not punch her, kick her, pick her up, curse at her, or try to cover her mouth.

### *The Defense Case*

Martinez testified in his defense. He acknowledged the incident occurred largely as Monica described it at trial, but he attributed it to a misunderstanding based on his drug-induced delusions. Specifically, Martinez testified that leading up to the day of the incident, he had been awake for about four straight days using methamphetamine,

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<sup>3</sup> A recording of Monica's 911 call was played for the jury. Monica told the operator: "I was almost car-jacked right now and I was fighting for my life. [¶] . . . [¶] I thought he was gonna take me in the car." Monica also told the 911 operator Martinez did not "appear to be possibly drunk or on drugs."

including five injected doses the day of the incident. He was operating under the delusion that a drug cartel had placed a "hit" on him and that hitmen were following him.

On the day of the incident, Martinez called his sister for a ride, but she was unable to coordinate with him. He then called his girlfriend, who drove him to the home of "an old acquaintance" from his "past lifestyle," which involved "illegal activities."<sup>4</sup> Martinez explained he visited this "O.G."<sup>5</sup> because he "has influence" and might be able to help Martinez out of the situation with the cartel. The acquaintance responded, " 'You're trippin'. Stop smoking. Stop getting high.' "

The girlfriend then dropped Martinez at a trolley station. Because he "felt [he] was going to get killed that night," Martinez told her to give his belongings to his brother because he (Martinez) "didn't need them anymore."

Martinez "lingered" a few hours at the trolley station "because there was a security guard there." When the guard got on a trolley headed downtown, Martinez got on too. Martinez got off the trolley downtown and walked to Horton Plaza because he thought he would be safe in a public place that was well-lit and had security cameras. During the walk, Martinez said he encountered a group of people he believed were associated with

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<sup>4</sup> On direct examination, Martinez briefly acknowledged he had suffered prior convictions: "Q. Okay. You said your past lifestyle. Were you involved in illegal activities? [¶] A. Yes. Before, I was. [¶] Q. Have you ever been convicted of crimes before? [¶] A. Yes, I have. [¶] Q. Have you ever went [sic] to trial before? [¶] A. No, I never have. [¶] Q. In all these crimes, had you done those? [¶] A. Yes, I did."

<sup>5</sup> "The term 'O.G.' stands for 'original gangster' in gang parlance and is a sign of respect." (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1045.)

the cartel, who told him, "No matter what you do or where you go, we are going to get you."

Martinez continued on to the mall, but discovered when he got there that "everything was closed." Feeling "pretty much like a sitting duck," Martinez decided to follow Monica to the parking structure to ask for a ride. He acknowledged that security camera footage showed him looking around as he followed her, but he explained this was because he was making sure he was not being followed by cartel associates.

Once in the parking structure, Martinez got in Monica's car and started to tell her what was going on, but she started screaming and yelling for him to get out. Martinez told her, "I just want a ride. There are people trying to kill me. I just have to get out of here." Monica continued honking and screaming. When Monica got out of her car, Martinez followed suit and placed his hands on her shoulders, telling her to calm down. Monica began hitting Martinez, so he restrained her arms and told her to calm down so the cartel associates would not find them and kill them both.

As Monica "kept on going crazy," Martinez continued to explain that he just needed a ride. Martinez believed she understood him because she got back in the car and said, "I'll give you a ride." But when Monica began driving erratically, Martinez jumped out of the open car door because he thought she was going to crash.

As Martinez walked out of the parking structure, he saw police near the mall. Rather than tell them what had just happened, he removed his jacket so he would "not get arrested or cause any attention to [him]self so [he] could get away." He walked to the

Hall of Justice because he felt he would be safe there due to the presence of security cameras and a security guard.

Martinez called his girlfriend and told her he needed a ride because someone was going to kill him. The girlfriend told Martinez he was "trippin' " and needed to go home and get some sleep. She agreed to give him a ride, but never met up with him because he gave her the wrong directions. The girlfriend called Martinez and told him she had persuaded his sister to pick him up.

Martinez's sister picked him up and drove him to their brother's home. On the way, Martinez told her about the cartel associates pursuing him that evening. The sister responded that he was "trippin' " and needed to stop using drugs.

Martinez testified he had previously experienced delusions when using methamphetamine, but never to the extent he experienced the night of the incident. He admitted on cross-examination that he was convicted of felony offenses in 2003, 2005, 2006, and 2014.<sup>6</sup>

Martinez's girlfriend corroborated at trial that she had given him a ride on the evening of the incident; "he looked like he was on something"; he said he was being followed; and he gave her his belongings to give to his brother. Martinez's sister testified she gave him a ride from the Hall of Justice to their brother's house on the night of the incident, and Martinez told her someone was following him.

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<sup>6</sup> We discuss Martinez's prior convictions in greater detail in part I.A., *post*.



A licensed psychologist, David DeFrancesco, testified about a psychological evaluation he performed on Martinez. In Dr. DeFrancesco's opinion, Martinez suffered from a "substance use disorder" that caused "perceptual disturbances," which may have caused Martinez "to have unrealistic views and/or see things." DeFrancesco believed Martinez suffered from this condition at the time of the incident. However, DeFrancesco acknowledged his opinions were based on information Martinez provided, which was not independently corroborated. DeFrancesco also acknowledged that "[p]eople who are high can make purposeful" and "intentional decisions," and remain "goal[-]directed."

Dr. DeFrancesco also diagnosed Martinez with "antisocial personality disorder," which "is basically a pervasive pattern [of] disregard and violation of the rights of others." Criteria associated with this condition include "failure to conform to social norms with respect to lawful behaviors indicated by repeatedly performing acts that are grounds for an arrest," "deceitfulness," "[i]mpulsivity or failure to plan ahead," "[i]rritability," "reckless disregard for self and others," "consistent irresponsibility," and "lack of remorse." DeFrancesco opined Martinez "[p]retty much met the criteria for all of those behaviors."

#### *Jury Verdicts, Priors, and Sentencing*

The jury found Martinez guilty on all counts.

After the trial court granted the prosecutor's motion to dismiss the prison prior allegation stemming from Martinez's 2012 drug-possession conviction, Martinez admitted the remaining prior allegations.

The trial court sentenced Martinez to 25 years in prison, consisting of 18 years on the conviction for attempted kidnapping during a carjacking (the nine-year upper term, doubled for the strike prior), five years for the serious felony prior, plus two 1-year prison prior enhancements.<sup>7</sup> The court also imposed sentences on Martinez's remaining convictions, but stayed them under section 654.<sup>8</sup>

## DISCUSSION

### I. *Instructional Error*

The trial court instructed the jury that it could consider Martinez's prior convictions in determining the credibility of his testimony. In doing so, the court modified a pattern jury instruction (CALCRIM No. 316) by replacing "felony" with "crime of moral turpitude," so that the relevant portion of the instruction read: "If you find that a witness has been convicted of a *crime of moral turpitude*, you may consider that fact only in evaluating the credibility of the witness's testimony."<sup>9</sup> (Italics added.)

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<sup>7</sup> The court did not double-count Martinez's robbery conviction as both a prior serious felony and a prison prior.

<sup>8</sup> At the same sentencing hearing, the trial court sentenced Martinez in a consolidated case to a consecutive term of one year four months, and a concurrent term of four years. Martinez does not raise any issues in this appeal arising from the consolidated case.

<sup>9</sup> The full instruction states: "If you find that a witness has been convicted of a crime of moral turpitude, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable."

The court also gave a special instruction defining moral turpitude (in part) as "a general 'readiness to do evil' . . . ." <sup>10</sup> Martinez never objected to either instruction.

Martinez now contends these instructions were improper because the special instruction's definition of moral turpitude improperly allowed the jury to consider his prior convictions not merely for impeachment purposes, but also as propensity evidence. <sup>11</sup> For reasons we will explain, Martinez forfeited this challenge by failing to object at trial, and the exception to the forfeiture rule for errors implicating a defendant's substantial rights does not apply on this record.

#### A. Background

The prosecution moved in limine to admit five of Martinez's prior felony convictions for impeachment purposes if he were to testify at trial. <sup>12</sup> Martinez moved in

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<sup>10</sup> The full instruction states: "*Moral turpitude* means a general 'readiness to do evil', i.e., 'an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' "

<sup>11</sup> Evidence of prior bad acts is generally inadmissible to show a criminal propensity. (Evid. Code, § 1101, subd. (a); see *People v. Jones* (2011) 51 Cal.4th 346, 371.) However, a "witness may be *impeached* with any prior conduct involving moral turpitude[,] whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352." (*People v. Clark* (2011) 52 Cal.4th 856, 931, italics added, fn. omitted; see Evid. Code, § 788 ["For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony," subject to certain exceptions.].)

<sup>12</sup> The motion cited the following convictions: (1) robbery, with a firearm-use enhancement, in 2003; (2) possession of a weapon (a folding buck knife) by a prisoner in 2005; (3) possession of a weapon (a hard spoon sharpened to a point) by a prisoner in 2006; (4) vandalism in 2014; and (5) burglary in 2014. The prosecution did not seek to

limine to exclude the convictions. After hearing argument from counsel, the trial court found the convictions admissible for impeachment purposes. Martinez does not challenge this ruling on appeal.

Martinez's trial counsel then asked the court to sanitize the convictions by informing the jury only that Martinez "suffered a felony conviction in these years, in these case numbers, without the information as to what the felony conviction is."

The prosecutor responded that this proposal was not "appropriate" because the "jury may be misled" in light of recent "changes in the law" that might leave jurors wondering whether Martinez's prior convictions were for less serious offenses.<sup>13</sup> Based on what he had "done in the past when faced in this situation," the prosecutor proposed that, "if the court is inclined to sanitize," it do so by indicating each conviction was for a "felony crime of moral turpitude and defining what moral turpitude is." The prosecutor acknowledged this approach would require defense counsel to "sort of have to make his

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admit Martinez's 2014 conviction for possession of a controlled substance, but referenced it in the motion to show that, although some of Martinez's convictions appeared remote in time, he had not led a legally blameless life in the meantime. (See, e.g., *People v. Anderson* (2018) 5 Cal.5th 372, 408 ["'Even a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior.' "].)

<sup>13</sup> We surmise the prosecutor was referring to the 2014 enactment of Proposition 47, the Safe Neighborhoods and Schools Act, which reduced to misdemeanors certain drug- and theft-related offenses that previously were felonies or "wobblers." (See *People v. Valencia* (2017) 3 Cal.5th 347, 351.) We base this supposition on the prosecutor's argument that "sanitizing [a conviction] to simply reflect a felony" might leave jurors "thinking it is a meth possession," which "doesn't give the People the appropriate probative value to the crime of moral turpitude."

own cost/benefit analysis as to [whether jurors] may think [a conviction] is something worse than, in fact, it was, but . . . the probative portion of the felony . . . is the fact it is a crime of moral turpitude."

Defense counsel did not object or otherwise respond to the prosecutor's proposal.

The trial court adopted the prosecutor's proposal, allowing counsel to "inquire as to the specific years, if the defendant suffered a crime of moral turpitude in 2014, 2006, 2000, et cetera." When the court asked defense counsel if he wished to raise any other issues, counsel responded, "No, your Honor. I appreciate the court taking the time."

During trial, Martinez testified on direct examination that his past lifestyle involved criminal activities that resulted in unspecified convictions. On cross-examination, the prosecutor probed Martinez's criminal background in greater detail:

"Q. Let's talk about some of your past. You are a convicted felon, are you not, sir?

"A. Yes.

"Q. Let's go back to 2003. You were convicted [of] a crime of moral turpitude back in 2003?

"A. Yes.

"Q. Again in 2005, you were convicted of a crime of moral turpitude?

"A. Excuse, me? What does moral turpitude mean or what?

"Q. I can define it for you, but I think by way of stipulation, that is—" [¶] . . . [¶]<sup>14</sup>

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<sup>14</sup> Counsel conferred off the record.

"Q. In 2005, you were convicted of a felony. You would agree with that, wouldn't you, sir?

"A. 2005, yes.

"Q. And in 2006, there was another felony you were convicted of?

"A. I believe so.

"[Prosecutor]: Your Honor, I think counsel and I will stipulate they are all crimes of moral turpitude pursuant to previous conversations.

"THE COURT: Is that acceptable, counsel?

"[Defense Counsel]: Yes, your Honor.

"THE COURT: The record will reflect that. Thank you.

"[Prosecutor] [¶] In 2014, you were convicted again of another felony, weren't you, sir? In fact, two different felony cases?

"A. Yes, I was."

After the close of evidence, the trial court instructed the jury regarding general evidentiary principles and the elements of the charged offenses. Regarding Martinez's prior convictions, the trial court read the following modified version of CALCRIM No. 316:

"316, 'Additional Instructions on Witness Credibility, Other Conduct.' If you find the witness has been convicted of a crime of moral turpitude, you may consider that fact only in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility, but it is up to you to decide the weight of that fact, whether that fact makes the witness less believable."

The court did not yet instruct the jury on the definition of moral turpitude.

During his closing argument, the prosecutor reiterated the jury could consider Martinez's prior convictions in determining his credibility:

"Let's compare the truth versus the defendant's versions of events. And when you are considering his testimony, you can consider those felony convictions. The law allows that. The court just instructed you on the law and that's all I have ever asked you to do from the first time I got a chance to talk to you. Your job is to follow the law and this is a part of it. You can consider these felony convictions in assessing his credibility when he sacrificed it and told you lies, lies which we know didn't happen. [¶] Those five felony convictions, crimes of moral turpitude, in 2003, 2005, 2006, and two more convictions in 2014, you can consider those. Those are tools."

The prosecutor's closing argument was interrupted by the lunch recess, during which he alerted the court to the fact it had not instructed the jury on the definition of moral turpitude. The prosecutor explained he had submitted a modified version of CALCRIM No. 316 that included a definition from case law.<sup>15</sup> Defense counsel stated he did not "recall the actual pinpoint instruction," but he "thought [he] did look at it." The trial court apologized for overlooking the prosecutor's proposed draft and asked if he would like the court to give a pinpoint instruction defining moral turpitude. The following colloquy ensued:

"[Prosecutor]: I would, your Honor. The reason why is in my experience, I have had this where the defense attorney has asked to sanitize, and it doesn't fail, when the jury goes back in there, they want to know what is moral turpitude."

"THE COURT: Yes. I've had the same situation. [¶] *People v. White* [(1992)] 4 Cal.App.4th 1299, 1302, there are numerous cases

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<sup>15</sup> See *People v. White* (1992) 4 Cal.App.4th 1299, 1302 [" 'Moral turpitude' means a general 'readiness to do evil' [citation] . . . '"].)

that cite that same language. [¶] So Special Instruction No. 1, I will put that in somewhere. Okay?

"[Prosecutor]: All right. Thank you, your Honor.

"THE COURT: Any further issues we can deal with at this point in time?

"[Defense Counsel]: No, your Honor. [¶] . . . [¶]

"[Prosecutor]: In dealing with my closing argument, it's okay for me to address because that will, in fact, be the law that is given?

"THE COURT: Yes. Just say the court will give you an instruction on this. . . ."

During his resumed closing argument, the prosecutor advised the jury that the court would be giving it an additional instruction defining moral turpitude:

"Highlighting just before we get into the law, I wanted to touch base on moral turpitude. It's a legal term of art, but the court will define it for you in terms of what is a crime of moral turpitude. It is defined as a readiness to do evil, an act of base[n]ess, [vile]ness, or depravity in the private and social duties which a man owes to his fellow men. And the court will give you a full description, but that's what a crime of moral turpitude is."

Defense counsel did not object. In his closing argument, defense counsel argued Martinez "was forthcoming about" his "past criminal lifestyle," which included "five felony crimes, crimes of moral turpitude."

After closing arguments, the trial court read the jury the following special instruction defining moral turpitude:

"The next instruction is called, 'SPECIAL INSTRUCTION NO. 1, Moral Turpitude,' and there was some talk by counsel in closing about moral turpitude. This is the definition of a crime of moral turpitude. Moral turpitude means a general readiness to do evil. That is an act of base[n]ess, [vile]ness, or depravity in the private



and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

Defense counsel did not object.

### B. *Forfeiture Principles*

"Generally, a party may not complain on appeal about a given instruction that was correct in law and responsive to the evidence unless the party made an appropriate objection." (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087; see *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) We may nevertheless review a claimed instructional error despite a defendant's failure to object if the claimed error "affect[s] the substantial rights of the defendant." (*Andersen*, at p. 1249; see § 1259 ["The appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."].) " 'In this regard, "[t]he cases equate 'substantial rights' with reversible error" under the test stated in *People v. Watson* (1956) 46 Cal.2d 818 . . . . ' " (*People v. Cardona* (2016) 246 Cal.App.4th 608, 612.) In other words, a defendant's substantial rights are affected when the claimed error "resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error." (*Andersen*, at p. 1249.) This analysis "necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*Ibid.*)

### C. Analysis

Applying these principles, we conclude Martinez forfeited his challenge to the moral turpitude instructions by repeatedly failing to object to them at trial. We further conclude the exception for claimed instructional errors implicating substantial rights does not apply because there is no reasonable probability the instructions resulted in a miscarriage of justice on the record before us.

Contrary to Martinez's assertion, it is not reasonably likely that the jury interpreted the moral turpitude instructions as allowing the jury to use his prior convictions as propensity (rather than impeachment) evidence. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525 ["the question is whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts"].) Indeed, CALCRIM No. 316, about which Martinez complains, expressly instructed the jury that it could use the fact of Martinez's prior convictions "*only* in evaluating the credibility of [his] testimony." (Italics added.) The court similarly instructed the jury that it could consider evidence admitted for a limited purpose "*only* for that purpose and for no other." (See CALCRIM No. 303.) And the court further instructed the jury that the fact of Martinez's prior convictions is merely one factor the jury can consider in its role as the exclusive arbiter of witness credibility. (See CALCRIM No. 226.) We presume the jury understood and followed these instructions. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 205-206 ["[T]he presumption that jurors understand and follow trial court instructions" is "a 'crucial assumption' . . . that 'underl[ies] our constitutional system of trial by jury.' "].)

Nor, as Martinez suggests, is it reasonably likely the jury construed the moral turpitude instructions as lessening the prosecution's burden of proof. To the contrary, the court instructed the jury regarding the presumption of innocence, which "requires that the People prove a defendant guilty beyond a reasonable doubt." (See CALCRIM No. 220.) The court reiterated in this instruction that "[w]henever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt."

Martinez argues the prosecutor "exploited" the "[t]he term moral turpitude . . . in closing argument to show [Martinez's] predisposition to commit the current offenses." We disagree. The prosecutor noted jurors could consider Martinez's prior convictions as "tools" in assessing his credibility. And although the prosecutor referenced the definition of moral turpitude, he never argued it allowed the jury to consider Martinez's prior convictions as propensity evidence. Far from "exploit[ing]" the definition of moral turpitude, the prosecutor urged the jury to follow the law and the court's instructions, which, as noted above, clearly instructed the jury it could consider Martinez's convictions "*only* in evaluating the credibility of [his] testimony." (Italics added.)

In the context of the entire record, any prejudicial effect the challenged instructions may have had was minimal in comparison with other evidence Martinez himself offered at trial. First, Martinez volunteered on direct examination that his "past lifestyle" involved criminal activity. Indeed, he claimed to have visited an O.G. from that lifestyle on the day of the incident. Second, the defense expert testified he diagnosed Martinez with antisocial personality disorder, traits of which include "a pervasive pattern [of] disregard and violation of the rights of others," "failure to conform to social norms

with respect to lawful behaviors indicated by repeatedly performing acts that are grounds for an arrest," and "deceitfulness." This testimony—with the imprimatur of an expert witness—was more likely than the challenged instructions to lead jurors to believe Martinez had a criminal propensity.

Finally, during defense counsel's closing argument, counsel acknowledged Martinez's prior convictions were for crimes of moral turpitude.

In sum, the moral turpitude instructions did not result in a miscarriage of justice because there is no reasonable probability that Martinez would have obtained a more favorable result had they not been given. (*Andersen, supra*, 26 Cal.App.4th at p. 1249.) Accordingly, we need not (and do not) consider the substantive merits of his forfeited claim.<sup>16</sup>

Anticipating this forfeiture finding, Martinez argues he received ineffective assistance of counsel by virtue of his counsel's failure to object to the moral turpitude instructions. We disagree.

"When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant

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<sup>16</sup> Because we have found Martinez forfeited his claim of instructional error under traditional forfeiture principles, we need not consider the Attorney General's contention that the invited error doctrine applies. (See, e.g., *People v. Stone* (2008) 160 Cal.App.4th 323, 331 [failure to object to jury instruction constitutes invited error even when the defendant argues his substantial rights are affected].)

must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).)

Martinez's claim he received ineffective assistance fails because the record shows his trial counsel made a tactical decision to acquiesce to the moral turpitude instructions in exchange for the court sanitizing Martinez's prior convictions. The parties proposed competing sanitization methods. The prosecutor acknowledged his proposed method would require defense counsel "to make his own cost/benefit analysis." The court then adopted the prosecutor's method, without any objection from defense counsel. Indeed, defense counsel never objected to the moral turpitude instructions despite the fact the issue arose numerous times during trial. The most reasonable reading of the record is that Martinez's trial counsel made the tactical decision to accept the moral turpitude instructions as the cost of obtaining the benefit of sanitizing Martinez's prior convictions. We defer to this reasonable tactical decision. (See *Mai, supra*, 57 Cal.4th at p. 1009.)

Consequently, Martinez has failed to show he received ineffective assistance of counsel at trial.

## II. *Sufficiency of the Evidence*

Martinez contends insufficient evidence supports his conviction for attempted kidnapping during a carjacking. We disagree.

### A. *Relevant Legal Principles*

#### 1. *Standard of Review*

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

#### 2. *The Charged Offense*

Kidnapping during the commission of a carjacking is defined in section 209.5, subdivision (a) as follows: "Any person who, during the commission of a carjacking and

in order to facilitate the commission of the carjacking, kidnaps another person who is not a principal in the commission of the carjacking shall be punished by imprisonment in the state prison for life with the possibility of parole." Subdivision (b) of section 209.5 provides that the offense occurs only "if the movement of the victim is beyond that merely incidental to the commission of the carjacking, the victim is moved a substantial distance from the vicinity of the carjacking, and the movement of the victim increases the risk of harm to the victim over and above that necessarily present in the crime of carjacking itself."

Simple kidnapping is defined in section 207, subdivision (a) as follows: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping."

Carjacking is defined in section 215, subdivision (a) as "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear."

In *People v. Medina* (2007) 41 Cal.4th 685 (*Medina*), the California Supreme Court clarified that "neither a completed kidnapping nor a completed carjacking is necessary for an attempted kidnapping during the commission of a carjacking." (*Id.* at p. 695.) This is because an "attempt to commit a crime is comprised of 'two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its

commission.' " (*Id.* at p. 694.) "Other than forming the requisite criminal intent, a defendant need not commit an element of the underlying offense." (*Ibid.*)

In *Medina*, the defendant, who was fleeing police, got in the driver's seat of a parked van occupied by two adults and three children. (*Medina, supra*, 41 Cal.4th at p. 691.) The mother began elbowing the defendant so he would get out. (*Ibid.*) The defendant shoved back and said, "We got to go, we got to go." (*Ibid.*) The mother yelled for the defendant to get out because her children were in the van. (*Ibid.*) The defendant reached for the ignition, but was unable to start the van, put it in gear, or move the steering wheel. (*Ibid.*) The "defendant muttered, 'Oh damn,' and left." (*Ibid.*)

The California Supreme Court found sufficient evidence supported the defendant's conviction on five counts (one per occupant) of attempting kidnapping during the commission of a carjacking. (*Medina, supra*, 41 Cal.4th at p. 699.) The court concluded circumstantial evidence supported the finding that the defendant had the specific intent to kidnap the family to facilitate a carjacking—the defendant jumped into the driver's seat of an occupied van and tried to drive it, all the while struggling with the mother, who was explaining that her children were in the van. (*Ibid.*) The court found the defendant's efforts to start the van, put it in gear, and move the steering wheel constituted direct but ineffectual acts performed in an attempt to commit the offense. (*Ibid.*)

#### B. *Analysis*

We conclude substantial evidence supports the jury's finding that Martinez harbored the specific intent to kidnap Monica during the commission of a carjacking. Martinez startled Monica by entering her car without permission and commanding her to



"[g]et out." When Monica partially exited the car to honk and yell for help, Martinez exited, confined Monica between the open car doors, grabbed her by both arms, and attempted to force her back into the car, grabbing the steering wheel in the process. Monica testified this made her fear for her life. When Monica got back in the car, Martinez also got back in and told her he wanted a ride. Monica feigned agreement, then drove erratically and ejected Martinez from the car. Martinez admitted at trial that he then attempted to elude the police, which the trial court instructed the jury could support an inference of Martinez's awareness of guilt.<sup>17</sup> The jury could reasonably infer from these actions that Martinez intended to kidnap Monica during a carjacking.

The jury could also conclude Martinez's acts of grabbing Monica, forcing her back into her car, and then "requesting" a ride constituted ineffectual acts in an attempt to achieve the target offense. Substantial evidence thus supports both elements of the offense of attempted kidnapping during a carjacking.

Martinez's efforts to distinguish the facts of *Medina* are unavailing. "Reviewing the sufficiency of evidence . . . necessarily calls for analysis of the unique facts and inferences present in each case, and therefore comparisons between cases are of little value." (*People v. Rundle* (2008) 43 Cal.4th 76, 137-138; see *People v. Thomas* (1992) 2

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<sup>17</sup> The trial court instructed the jury with CALCRIM No. 372 as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

Cal.4th 489, 516 ["When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts."].)

Martinez argues there was insufficient evidence showing he moved Monica a substantial distance because the prosecution "failed to establish the actual distance [she] traveled as she whipped her car around in the parking structure . . . ." (See § 209.5, subd. (b) [victim must be "moved a substantial distance from the vicinity of the carjacking"].)

Although it may be unclear whether Martinez *actually* moved Monica a substantial distance, the jury only had to find that he *intended* to do so. (See *Medina, supra*, 41 Cal.4th at p. 694 [conviction affirmed where the defendant never moved the victims].) Based on the fact the car was parked on the fourth floor of the parking structure, and Martinez's testimony that he was trying to leave the location to elude hitmen, the jury could reasonably conclude Martinez intended to move Monica a substantial distance.

Martinez asserts he "actually and reasonably believed [Monica] consented to the movement when she said she would give him a ride." This misunderstands the substantial evidence review standard. Monica testified she purported to consent to being moved only *after* Martinez grabbed her and pushed her back into her car. The jury could reasonably infer from this testimony that it was unreasonable for Martinez to believe Monica truly consented to being moved. (See *People v. Sattiewhite* (2014) 59 Cal.4th 446, 476-477 [victim's "attitude" relevant to determining consent]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction"].)

In sum, substantial evidence supports the jury's finding that Martinez harbored the specific intent to kidnap Monica during the commission of a carjacking, and that he performed ineffectual acts in an attempt to do so.<sup>18</sup>

### III. *Prior Serious Felony Enhancement*

The trial court sentenced Martinez to a consecutive five-year term under section 667, subdivision (a) for his prior serious felony conviction (the 2003 robbery). At the time of sentencing, the trial court was required to impose this term. (§§ 667, former subd. (a)(1), 1385, former subd. (b).) While this appeal was pending, the Legislature amended sections 667 and 1385 to give trial courts discretion during sentencing to strike or dismiss five-year prior serious felony enhancements in the "furtherance of justice." (See Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) The new law took effect on January 1, 2019. (*Garcia*, at p. 971.)

After the parties completed their initial briefing on appeal, Martinez filed a supplemental brief arguing that Senate Bill No. 1393 applies retroactively and gives the trial court sentencing discretion to strike his five-year enhancement. The Attorney General filed a response agreeing that Senate Bill No. 1393 applies retroactively. We agree. (See *Garcia*, *supra*, 28 Cal.App.5th at pp. 971-973.)

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<sup>18</sup> Because we have found no error with respect to Martinez's convictions, we reject his claim of cumulative error. (See *People v. Bennett* (2009) 45 Cal.4th 577, 618 ["With the exception of a single erroneous evidentiary ruling, which was harmless beyond a reasonable doubt, we have rejected all other claims of error; thus there is no cumulative error."].)

The Attorney General maintains that even though Senate Bill No. 1393 applies to this case, remand is unnecessary because it would be a futile exercise. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand not required if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement"].) In support, the Attorney General cites the fact the trial court denied Martinez's *Romero*<sup>19</sup> motion to strike his strike prior and prison priors. In doing so, the trial court made the following comments:

"[T]here is no basis for the court to exercise its discretion and strike the strike or the prison priors. For the court to do so would actually be an abuse of discretion. [¶] Mr. Martinez, unfortunately, is literally and figuratively a poster child for the Three-Strikes Law."

After recounting Martinez's lengthy criminal history, the court reiterated that although it was "somewhat sympathetic" to Martinez's claimed history of substance abuse, "there is no basis in law or fact how I should exercise my discretion and strike the strike prior in this case or the prison prior. *The five-year prior, of course, I have no authority to strike that under case law.*" (Italics added.)

The trial court then imposed the nine-year upper term (doubled to 18 years for the strike prior) on the conviction for attempted kidnapping during a carjacking, a consecutive five-year term for the serious felony prior, and two consecutive one-year terms based on Martinez's prison priors.

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<sup>19</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

On this record, we are unable to say with certainty that the trial court would not have exercised its newly vested discretion favorably to Martinez. The fact the court declined to exercise its discretion to strike Martinez's strike prior and prison priors does not necessarily indicate the court would still have imposed the five-year enhancement if it had the discretion not to. That is, by denying Martinez's motion to strike the strike prior and prison priors, the court extended Martinez's sentence from nine years to 20 years (by doubling the nine-year principal term and adding two 1-year enhancements). The court *may* have concluded this was an appropriate sentence. Or it *may not* have. We simply cannot discern this from the record.

Accordingly, we conclude Martinez is entitled to a limited remand to afford the trial court the opportunity to exercise its newly vested discretion under Senate Bill No. 1393. We express no view on how the trial court should exercise its discretion.

#### DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. The trial court is directed to exercise its discretion under Senate Bill No. 1393 to determine whether to strike the five-year enhancement for Martinez's prior serious felony conviction. Upon resentencing, the trial court is directed to issue a new abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

IRION, J.

DATO, J.